STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

FEI Enterprises, Inc. Case No. 06-0142-PWH

From a Notice of Withhold issued by:

Los Angeles Unified School District

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS AFTER RECONSIDERATION

Affected subcontractor FEI., Inc. ("FEI") submitted a timely request for review of the Notice of Withhold ("Notice") issued by Los Angeles Unified School District ("District") with respect to the El Oro Safety and Technology Project, Project # 97.02938 ("Project"). The District withheld contract funds from FEI, claiming the contractor failed to pay prevailing wages, failed to pay accrued fringe benefits, misclassified its workers resulting in an underpayment of prevailing wages, and under-reported workers at the Project. The Notice was amended for the last time on May 24, 2007 ("Amended Notice").[1] The hearing on the merits occurred on November 20, 2006, January 29, 2007, March 23, 2007, March 26, 2007, May 24, 2007, May 31, 2007, June 21, 2007, August 23, 2007 and December 13, 2007, before Hearing Officer Terrance O'Malley. Robert G. Klein appeared for FEI. David M. Huff appeared on behalf of the District. Laura Nash appeared on behalf of FEI's surety. Subsequent to the submission of the case, the matter was reassigned to Anthony Mischel as Hearing Officer. The original Decision of the Director issued on September 18, 2008. The District sought reconsideration of the Director's refusal to take Official Notice of an Important Notice, dated March 4, 2003, ("Important Notice") and the consequent refusal to affirm the use of second shift wage rates for Inside

[1] At the hearing on May 24, 2007, the District in fact only introduced an amended audit of its findings and did not seek to amend its Notice under California Code of Regulations, title 8, section 17226. The parties, however, have stipulated that this May 24, 2007, audit would be considered an Amended Notice. As any request for review must be from a notice, not an audit, this Decision will refer to the audit of May 24, 2007, as the operative Amended Notice.

Wiremen. Because the matter could not be resolved within the 15 days provided by statute, the submission was *de facto* vacated solely to consider the Important Notice issue. Now, for the reasons set forth below, the Director issues this Decision After Reconsideration, affirming and modifying the Amended Notice but remanding to the District to recalculate its Notice in accordance with this Decision.

FACTS

The Project involved the installation of conduit, switches, receptacles and outlets for low voltage, intrusion security, and public address systems. The work necessarily included high voltage work to power the systems. There was asbestos and lead present in the walls through which holes were drilled. All of the work performed was subject to the payment of prevailing wages under Labor Code section 1720 *et seq.*[2] No wages were paid in the 60 days subsequent to the service of the Notice although some fringe benefits were paid later through settlement with two union trust funds.

The Bid Advertisement Dates were September 18, 2003 and September 23, 2003. All work was performed between March 12, 2004 and October 23, 2005. The Request for Forfeiture of Funds the District submitted to the Division of Labor Standards Enforcement ("DLSE") states that the Project was accepted by the District on February 14, 2006. The Notice of Completion was recorded on February 16, 2006. On August 11, 2006, the District served its original Notice on FEI. The District withheld contract payments of $173,794.81, which was reduced to $114,848.70 in the Amended Notice.

The District's Notice withheld contract payments for several reasons.

- FEI paid workers less than prevailing wages for safety meetings, pick up and delivery.
- FEI misclassified its workers by paying them in lower paid classifications than the work justified (e.g., Laborer instead of Communication and System Installer or Communication & System Installer instead of Inside Wireman wages.)
- FEI improperly split the rates paid to particular employees based on the type of work they

[2] All further statutory references are to the California Labor Code unless otherwise specified.

reported doing in a particular shift.

- FEI failed to pay a required second shift differential rate for shifts that began after the time of the school day (3:00 p.m.).
- FEI failed to pay accrued fringe benefits to the employees or to an appropriate trust fund on their behalf.
- FEI misclassified and underpaid supervisor, Joseph Gamb.
- FEI failed to pay employee, Bruce Spitzer the requisite prevailing wage.
- FEI failed to pay prevailing wages to project manager Thomas Garnica on two days.

The District alleges the violations were willful and intentional, and that FEI's history of nonpayment of prevailing wages supports the imposition of penalties under sections 1775 at $50.00 per violation.

The applicable PWDs are: SC-23-102-2-2003-2 (Laborer); SC-23-102-882-1-2003-1 (Asbestos and Lead Abatement (Laborer)), LOS 2003-2 (Inside Wireman and Communications and System Installer). There are different shift differentials for Inside Wireman[3] and Communications & System Installer[4] (both of which derive from IBEW contracts) that provide

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[3] Shift provisions for Inside Wireman states:

> Section 3.12. When so elected by the contractor, multiple shifts of at least five (5) days' duration may be worked. When two (2) or three (3) shifts are worked: the first shift (day shift) shall be worked between the hours of 6:00 a.m. to 6:00 p.m. Workmen on the day shift shall receive eight hours' pay at the regular hourly rate for eight hours' work.
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> The second shift (swing shift) shall be worked between the hours of 4:30 p.m. and 12:30 a.m. Workmen on the "swing shift" shall receive eight (8) hours pay at the regular hourly rate plus ten percent (10%) for seven and one-half (7 ½) hours work.
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> The third shift (graveyard shift)shall be worked between the hours of 12:30 a.m. and 8:00 a.m. Workmen on the "graveyard shift" shall receive eight (8) hours pay at the regular hourly rate plus fifteen percent (15%) for seven(7) hours' worked
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> * * *
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> All overtime work required after the completion of a regular shift shall be paid at one and one-half times (1 ½)the shift hourly rate.
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> * * *
>
> There shall be no requirement for a day shift when either the second or third shift is worked.

[4] Shift provisions for Communications and Systems Installer states, in part:

for increased pay rates when work is performed outside the normal working hours.

The Scope of Work for Inside Wireman states in part:

> Workmen employed under the terms of this agreement shall do all electrical construction, and installation or erection work, including final running tests. This shall include the installation of all temporary power and light wiring .... This shall also include the installation of all electrical lighting, heating and power equipment, fiber optics, and the installation and connecting of all electric equipment including computing machines and devices.
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> HANDLING MATERIAL Section 3.33. The handling and moving of all electrical material, equipment and apparatus on the job shall be performed by workmen employed under the terms of this Agreement.

The Scope of Work for Communications & System Installer states:

> The work covered by this agreement shall include the installation, testing, service and maintenance, of the following systems which utilize the transmission or transference of voice, sound, vision and digital for commercial, education, security and entertainment purposes for the following: ... intercom and telephone interconnect, inventory control systems, ... multi-media, multiplex, nurse call system, radio page, school intercom, burglar alarms and low voltage master clock systems.

On July 17, 2008, newly appointed hearing officer Mischel vacated the submission of the matter and reopened the record to clarify various matters including the District's apparent failure to calculate the Amended Notice using the correct PWD and the state of the admitted exhibits. Thereafter, Requesting Party sought permission to have 22 previously listed (but never formally

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Section 3.04. When so elected by the Contractor, multiple shifts of at least five (5) days duration may be worked. When two (2) or three (3) shifts are worked:

The first shift (day shift) shall consist of eight (8) consecutive hours worked between the hours of 8:00 a.m. and 4:30 p.m. Workmen on the "day shift" shall be paid at the regular hourly rate of pay for all hours worked.

The second shift (swing shift) shall consist of eight (8) consecutive hours worked between the hours of 4:30 p.m. and 1:00 a.m. Workmen on the "swing shift" shall be paid at the regular hourly rate of pay plus 17.3% [a subsequent entry lowers this figure to 10% for Los Angeles County] for all hours worked.

The third shift (graveyard shift) shall consist of eight (8) consecutive hours worked between 12:30 a.m. and 9:00 a.m. Workmen on the "graveyard shift" shall be paid at the regular hourly rate of pay plus 31.4% [15% for Los Angeles County] for all hours worked.

The Employer shall be permitted to adjust the starting hours of the shift by up to two hours in order to meet the needs of the customer.

... There shall be no requirement for a day shift when either the second or third shift is worked

identified) documents admitted into the record.[5] The matter again was submitted on September 5, 2008.

Basis for Notice.

The District compared the Certified Payroll Records ("CPRs"), the construction project diary prepared by the Inspector of Record for the District, the construction dailies prepared by FEI, timecards, several employee complaint forms and statements, and cancelled checks. From these documents, it determined FEI misclassified its employees and failed to make appropriate payments to its workers and to two union trust funds on behalf of the workers as described below. The investigation file provided support for the Amended Notice.

Hours of Work.

The District used the hours FEI reported on its time cards because the CPRs did not list the time workers spent in safety meetings and for pick up and delivery related to the Project. These non-CPR hours were paid for at a non-prevailing wage rate and were recorded on each employee's time card but not on the CPR. The District treated these hours as being subject to the payment of prevailing wages.

The safety meetings were mandatory safety meetings that occurred at the job site. The meetings lasted approximately 15 minutes at the beginning of each shift one day per week. In total, nine employees were paid less than prevailing wages for safety meetings, and "pick up and delivery." There were 68 work days and 125 hours that were paid at rates below prevailing wage for these tasks.

Supervisor Joseph Gamb testified that the pick up and delivery work consisted of workers carrying equipment and materials from a central storage facility on the school campus to the classrooms where work would be performed each day. FEI employee, Ronit Faigel speculated that some of the pick up and delivery time was spent transporting materials from FEI's office to the job site. There is no evidence that the work did not involve moving materials and equipment

[5] After the completion of testimony, the District acknowledged its use of succeeding PWDs was incorrect. In light of the resolution of the request for review, however, this error is not fatal and can be remedied in response to the Remand Order.

to complete the Project.

The time cards reflected the amount of time spent in "safety meetings" and on "pick up and delivery" at the hourly rate of $7.80. No time card records 15 minutes for a safety meeting; all entries for safety meetings are at a minimum recorded as ½ hour.

Classification.

The District determined that the workers should be paid as Inside Wireman when the construction diaries used terms such as "power," "power strip," "conduit," "raceway," or "wire", or when the worker complaints identified their work as "electrical". In instances where the term "ringing," "low voltage," or "cable" appeared, the District concluded they were working on low voltage systems and determined the minimum rate of pay to be Communication and System Installer.

With limited exceptions, the District reclassified workers originally paid at a laborer pay rate to one of the electrician categories; unless the daily logs showed no electrical work was performed. The District's justification was that work described as non-electrician was ancillary to the electrician work, and there was insufficient evidence of any employee doing purely laborer's work in a shift.

FEI paid some workers on some days using the pay rate for Laborer, Asbestos Abatement. The District reclassified these workers to Inside Wiremen or Communication and System Installer based on the inspector logs. According to Gamb, the only percipient witness, asbestos abatement was not performed as an independent, stand alone activity; rather it occurred as part of other activities such as mounting conduit. FEI presented no evidence other than its time cards that on specific days the asbestos abatement workers did nothing except for asbestos abatement.

FEI applied multiple pay classifications to individual employees during the same shift depending on FEI's characterization of the work performed during that particular shift. FEI determined how much to pay each worker based on a report each worker orally communicated to FEI daily. The worker reported the total hours he worked in a day and described the type of work performed as well as the total hours he estimated he engaged in each task. There is no

indication that these "task" totals represented discrete periods of work; that is, the work reported could have been spread out over the entire day intermixed with other tasks. FEI classified the work into prevailing wage rate categories with the reported "task" time paid based on a preset standard that attached specific work activities to specific prevailing wage rates.

The multiple classifications and corresponding hourly wage rates were detailed on the Employee Time Cards that were reviewed and signed by employees when they received their paycheck; these records show the total hours each day estimated for each task. There is no independent verification that the time reported by the worker was accurately reported as FEI did not keep documentation. There is no evidence that the workers understood that their reports of the total amount spent on a task during a shift affected the rate of pay they received. For example, there is no indication that a worker knew how to report two hours spent simultaneously installing both high voltage and low voltage wiring. It appears that FEI would have classified the work as one hour at Inside Wireman and one at Communication and System Installer, even if the work occurred simultaneously (thereby justifying payment of only the higher, Inside Wireman, rate). Thus, it is impossible to determine whether the various pay rates FEI reported on the time sheets were accurate descriptions of what a worker did during the day.

Joseph Gamb testified that employees worked on high and low voltage systems simultaneously.

> ...The wiremold[6], we had to put electrical – we had to run electrical wires into the wiremold. We had to put receptacles for the data outlets. You have your data and you have your electrical outlet. You can't just have a data outlet and have nothing for the computer to plug into, sir. We had to put them in. We had to terminate the wires. We had to install the receptacles, install the cover plates for the receptacles, to take those wires and bring them all the way to the panel and terminate them in the panel, sir.

According to one worker, Robert Ohanian,

> My work for FEI at the El Oro and Danube projects was working as an electrician with the high voltage crew. I pulled and installed conduit, wire-mold, pull boxes, and connected panels. I often ran wire through the attics

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6 Wiremold is a brand name type of conduit.

above the classrooms. I never dug trenches at the El Oro or Danube projects.

One example of how the District interpreted the documents available to it as well as FEI's timekeeping system is seen by a review of employee, Eduardo Rios on May 10, 2004. The construction diary states that one superintendent and three journeymen installed conduit and wiremold in Building "K" and re-worked corrections in Building "C." Rios subsequently prepared a written description of the work he performed on May 10, 2004, which states he worked from 3:00 p.m. to 11:30 p.m. "installing wiremold electrical" with a one half hour break for lunch. FEI's timecard shows Rios worked 8 hours. FEI paid him 2 hours for delivery and pick up at $7.80 per hour; one hour for safety meeting at $7.80 per hour; 4 hours as Laborer, Group 4 at $22.75 per hour, and 1 hour as Laborer, Group 1 at $20.10 per hour.[7] FEI's CPR for the same day shows Rios reflects the 5 hours he was paid as a laborer. No percipient witness testified. The Amended Notice reclassified all eight hours as payable at the Inside Wireman rate, with a second shift differential.

Another example of the District's calculation resulting from a changed classification is seen by a review of the week ending September 19, 2004. The CPR lists only Martin Cuevas, who was paid as a Laborer, Asbestos Abatement for four days, Monday through Wednesday, and Friday. The construction diaries for these four days list "no activity" on Monday and Thursday; list "F.E.I. Ent." (1) Supt. (1) journeyman (1) laborer. Installing Cat 60 locks in the "LDC's". Patch and Paint Area's Affected by this Project." On Friday, the diary states, ""F.E.I. Ent." (1) Supt. (1) Laborer. Working on punch list items for FTPMG, Install ground straps on 'LDC' Doors." The Amended Notice accepts the days of the week Cuevas worked and the hours reported as accurate. The Amended Notice reclassified Cuevas as Repainter for Monday through Wednesday and as a Communication & System Installer on Friday, based on the construction diaries. There was no testimony about this week.

Second Shift.

A portion of the construction performed at this elementary school occurred during the school year. FEI worked a single shift during the Project. On days when school was in session,

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[7] Unfortunately, FEI's pay records did not record the total prevailing wage rate, only the basic hourly rate.

work on the project commenced at 3:00 p.m., after school ended. Work started at 7:00 a.m. on days when school was not in session. The District relied on the posted LAUSD Calendar to determine if school was open. FEI did not vary the wages it paid any worker because of this fluctuating construction schedule.

FEI contested that this late shift work occurred in July and August, based on employee sign-in sheets that showed work occurred from 7:00 a.m. to 3:30 p.m. FEI did not contest the other claimed days that the District found work started at 3:00 p.m. The dates the District now claims as subject to second shift differential do not include any dates in July or August 2004.[8]

FEI further contends that the second shift rarely lasted eight hours because District's custodians locked up the schools and went home well before 11:30 p.m. The Amended Notice shows that the District used the hours FEI recorded (which varied between three hours in a day to eight) as the basis for calculating the prevailing wages due. If the District's calculations were inaccurate because the custodians left early, the error was based on inaccurate reporting by FEI. Gamb testified that when custodians left early, the FEI workers locked up the school. FEI claims it has overpaid its workers on nights they went home early and claims a credit for the overpayment but provides no evidentiary support for its claim.

Fringe Benefits.

The CPRs identified the employee, his classification, days and hours worked, and his basic prevailing wage rate of pay.[9] The CPRs did not specify the payment of fringe benefits because FEI incorrectly believed accounting for fringe benefits in the CPR was not required since they were paid to the trust funds, not the employees.[10] The Amended Notice credits FEI

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[8] The District now calculates 296 days when work was performed and school was open.

[9] For some unspecified period of time FEI reported a "blended" prevailing wage rate on its CPRs. This "blended" rate was calculated by multiplying the hours worked at each pay rate and adding the totals for each day, then dividing by the total number of reported hours. The resulting rate corresponded to no published rate, therefore.

[10] See, section 1776(a) ["Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work."] "Per Diem wages" include mandatory fringe benefits. (§ 1773; see, also, Cal. Code Regs., tit. 8, § 16000.)

only for those payments made to two separate union trust funds on behalf of FEI workers that the District could verify (primarily through cancelled checks) were made prior to the original Notice date (August 8, 2006).[11]

Fedida testified contradictorily that all fringe benefits were paid on-time for the Project **and** that fringe benefits on the Project were not paid because the District issued overlapping Stop Notices, which prevented FEI from being able to pay the trust funds for work on the Project. Stop notices were issued beginning in November 2004 because FEI failed to pay fringe benefits; they do not appear to be the initial cause of FEI's failure to pay fringe benefits nor do they appear to be caused by FEI's failure to pay on other projects. FEI claims to have paid $42,295.96 before the end of 2005. As the exhibit on which FEI relies does not differentiate between all the District projects, there is no way to corroborate the claim. FEI claims it now has resolved all issues with the laborer's and electrician's trust funds concerning unpaid fringes for wages identified in the CPR. FEI failed to submit any evidence about these settlements to show which trust fund has been paid, how much money, for which worker toward the fringe benefit portion of the prevailing wage obligation.

In addition, FEI did not pay fringe benefits for hours it did not list on the CPRs, such as for safety meetings and pickup and delivery.

Training Fund Contributions.

The Amended Notice found that $1,881.84 in training funds contributions under section 1777.5(m)(1) remained unpaid. FEI presented no evidence that this amount is incorrect.

Joseph Gamb.

FEI paid Gamb as an Inside Wireman or Communications System Installer for 20 hours each week and paid him $20.00 per hour as a supervisor for the remaining 20 hours. Gamb was a supervisor but worked as an electrician at the same time he was performing most supervisory functions. He did not spend any significant time during any work day solely supervising

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[11] The District claimed the right to demand cancelled checks under California Code of Regulations, title 8, section 16000 [definition of "payroll record."]. This issue appears moot.

workers. FEI paid Gamb by dividing his time between supervision (for which it did not pay prevailing wages) and electrical based on its estimate of what percentage of time Gamb should have spent on supervision. Fedida had no personal knowledge about the work Gamb performed.

Bruce Spitzer.

Spitzer was not listed on FEI's CPR nor was he paid for work allegedly done on the project. The District relied on Spitzer's complaint as the support for its determination that FEI failed to pay Spitzer the required prevailing wages for his work. Fedida knew Spitzer and admitted that FEI employed Spitzer on a City of Los Angeles project. Fedida denied Spitzer ever worked at El Oro, based on his personal knowledge. Spitzer did not testify.

Edgar Aquino.

Edgar Aquino was an electrical apprentice. The Amended Notice determined that on two days in the week ending April 11, 2004, he worked as Laborer doing site clean up work. The construction reports for that day show both electrical work and clean up work being performed. Unlike other instances when the District treated clean up work as ancillary to the electrical tasks performed in a shift, the District reclassified Aquino as a laborer (a higher pay rate than his apprentice rate) for the entire day. The only explanation given was that this clean up occurred shortly before the school reopened from a holiday, and the District assumed he spent the day only cleaning up. The District pointed to no other situation when it reclassified an electrician to Laborer in similar circumstances.

Gilbert Thomas Garnica.

The CPR's for May 1, 2005, and May 8, 2005, only list Garnica, who is classified as a supervisor with no prevailing wage classification listed. There are no construction diaries for these weeks. The District's audit notes that Garnica is reclassified to Inside Wireman "because all other Supervisors are working Supervisors." Garnica was a project manager, not a working foreman. There is no evidence that anyone from FEI worked on the Project in these weeks or that the District had any information on which to support a reclassification to Inside Wiremen.

Penalties

FEI claims it should not pay penalties because it got incorrect advice from the Division of Labor Statistics and Research ("DLSR") on the proper wage rate to pay for safety meetings and pick up and delivery and because the District tacitly approved FEI's pay practices

Feigel's testimony concerning her attempts to determine what wage rate applies for hours spent when not performing actual construction was:

> A Most likely I double-checked that with the DLSR, with the Division of Labor, and an inside wireman is classified -- a laborer in general is classified as someone who has tools and working with his tools; and while they were sitting in a safety meeting, they don't hold any tools, they don't do any job, they just go over safety.
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> Q Okay. Now, how about -- We also noticed that there were some entries on the time cards for material pickup. Do you remember those entries?
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> A Yes.
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> Q How did you determine -- What rate did you pay people that were picking up materials?
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> A On a minimum wage as well.
>
> Q Why?
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> A ...There is no classification for that, for them doing any labor work that could be classified as communication or laborer or inside wireman.

Feigel had numerous conversations with the District's auditor about the CPR's on issues such as FEI's use of "blended rates" and its failure to list fringe benefits due. Feigel never discussed the proper payment of second shift differentials with the District.

DECISION

Sections 1720 *et seq.* set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

> The overall purpose of the prevailing wage law is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and

employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [*citations omitted*].) The policy of the state is to vigorously enforce minimum labor standards, including prevailing wage requirements, not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Section 90.5, subd. (a), and *see Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay to workers who were paid less than the prevailing rate the difference between the prevailing rate and the rate actually paid. That section also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a civil wage and penalty Assessment under section 1741.

When an enforcing agency determines that a violation of the prevailing wage laws has occurred, a written Notice is issued. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. "The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect." (§ 1742(b).)

Section 1771 requires that all workers on a public work receive at least the general prevailing "per diem wage." There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments and a contribution to the California Apprenticeship Council ("CAC") or an approved apprenticeship training fund. (§ 1773.1.) The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker's behalf and for his benefit. An employer cannot pay a worker less than the basic hourly rate; the balance must be paid either to the worker as wages or may be offset by credit for "employer payments" authorized by section 1773.1, such as to a union trust fund.

FEI FAILED TO PAY PREVAILING WAGES.

FEI Failed To Pay Prevailing Wages For Safety Meetings and For Pick Up and Delivery.

The only hours in dispute are those listed on employee time cards for safety meeting and pick up and delivery work in conjunction with the Project, all of which were paid at close to the state minimum wage. All other hours claimed in the Amended Notice come from FEI's CPRs and are presumably correct. FEI owes additional wages for time spent in safety meetings, pick up and delivery. FEI argues it was excused from paying prevailing wages for these tasks since (1) the work was off site, and (2) there is no classification that encompasses this work. Gamb's testimony on safety meetings and pickup and delivery work was specific and credible that the work in question was on-site. There is no contrary evidence except for Faigel's vague testimony, which does not necessarily concern the relevant hours.

The contested hours were worked by FEI employees in the execution of the Project; this entitles them to the payment of prevailing wages. In *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, the Court of Appeal said the right to be paid prevailing wages is governed by the plain meaning of sections 1771, 1772 and 1774. Section 1771 requires the prevailing wage be paid to "to all workers employed on public works." Section 1772 provides: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." A public works contractor shall ensure that all workers engaged in "the execution of the contract" receive the prevailing wage. (§1774.)

> In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of "execution" is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed.1989) p. 521); "the act of carrying out or putting into effect," (Black's Law Dict. (8th ed.2004) p. 405, col. 1); "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.
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> (*Williams, supra,* 156 Cal.App.4th at 749- 750.)

FEI has not met any burden of proof that the hours in question were spent other than in the

execution of the Project. Therefore, the workers were entitled to prevailing wages.

FEI Misclassified Its Workers And Prevailing Wages Are Due.

The District had an adequate basis on which to reclassify workers as it did based on the records it could gather during its investigation. The District's evidence from the Inspector's Diary, FEI Daily Reports, FEI timecards, worker complaints, and worker interviews, as corroborated by the only two percipient witnesses, Gamb and Ohanian, presented substantial evidence that FEI misclassified workers by applying Communication and System Installer to work that should have been classified as Inside Wireman, and by applying laborer classifications to work that should have been classified as Inside Wireman or Communication & System Installer.

Employers are required to keep accurate records of the hours employee's work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160.) Employers on public works also must keep accurate records of the classifications for each employee. (§ 1776(a).) When an employer fails to maintain accurate time records, a claim for wages may be sustained based on credible estimates from other sources. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the worker's reasonable estimate. (*Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680 [rule for estimate-based overtime claims under the federal Fair Labor Standards Act, 29 U.S.C. §§201 et seq.]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-7 [applying same rule to state overtime wage claims]; and *In re Gooden Construction Corp.* (USDOL Wage Appeals Board 1986) 28 WH Cases 45 [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

The same precision is required for FEI to meet its burden to justify paying its employees based on multiple pay classifications during a single work shift. FEI would have had to present evidence of precise amount of time each worker spent each day on each task and when the task was performed to justify each of the different rates. This burden is made more difficult because sometimes specific tasks may be performed by someone paid at a lower paid classification but may also be ancillary to work performed by a worker in a higher paid classification. For

example, clean up work properly can be paid at a laborer's rate but is also ancillary to electrician's work. Prevailing wage determinations do not make such "exquisite distinctions." (*Pipe Trades District Council v. Aubry* (1996) 41 Cal. App.4th 1457, 1473.) The circumstances under which a contractor can properly use multiple pay classifications do not have to be delineated here, as FEI has failed to present accurate evidence of what its workers did each day to allow the Director to distinguish between ancillary work performed and a true task performed at a lower pay rate.

It is virtually impossible to determine how FEI determined each day the various rates it paid, as can be seen in both the Rios and Cuevas examples above. There are no records showing what workers told FEI office staff about the tasks performed; all that exists is the record keeper's conclusion. The record keepers were confused on the standards as well. For example, Feigel categorized the installation of conduit of less than ten feet as Communication and System Installer rate of pay while Fedida said that all conduit installation was paid at the Inside Wireman rate of pay.[12] FEI has failed to meet its burden to prove the Amended Notice is incorrect with respect to the misclassification of workers for the work they performed (including the hours for safety meeting and pick up and delivery). It is therefore liable for back wages, which shall be recalculated for each worker at the classification just affirmed for each day, pursuant to the remand order below.

FEI Failed To Pay Second Shift Differential To Communication and System Installers.

"[A]ll parties and the public have a right to rely on the general determinations published by the Director on the DLSR website. Contractors and subcontractors are deemed to have constructive knowledge of those determinations." (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) This means the Director has to enforce the determinations based on their plain meaning, not the private agreements between third parties.

The Amended Notice relies only on DLSR's published shift provisions for Inside

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[12] There is no evidence that a ten foot rule exists for Communication and Systems Installer in Los Angeles County.

Wireman and for Communication & System Installer, quoted above.[13] The District calculated shift pay for the first 7.5 hours at the requisite premium rate and 1 ½ times the appropriate prevailing wage for the last ½ hour.

FEI contends that second shift differential rates do not apply because they are only required when two or more shifts are worked, and FEI never had two shifts. The language in each PWD is explicit: "There shall be no requirement for a day shift when either the second or third shift is required." Clearly, even if no day shift is worked, a shift commencing in the late afternoon and ending in the late evening is subject to the shift differential. FEI's argument, which focuses on an irrelevant paragraph that concerns multiple shifts, completely ignores this clear statement.

FEI further argues that there was never a 4:30 p.m. to 12:30 a.m. shift. When the shift started at 3:00 p.m., on most occasions, it concluded at 10:00 p.m., due to closure of the campus. The Inside Wireman shift provision is silent on the ability to adjust the starting time, but the Important Notice fills the gap. The Important Notice simply recognizes a flexibility on a prevailing wage job where there is evidence that such flexibility exists in the private sector. The existence of a contractor's ability to vary the start time for a second shift for Communication and System Installers is evidence that the electrical trade in Los Angeles County typically allows second shift start times to vary by as much as two hours.

FEI and its surety argue that the Important Notice is not subject to Official Notice under the Rules (specifically Rule 45[14]) as it is not a prevailing wage determination or a regulation. If the Important Notice is a regulation, FEI and its surety argue it is an underground regulation and void. (See, *Tidewater Marine, Inc., v. Bradshaw* (1996) 14 Cal.4th 557.) Prevailing wage determinations include more than just wage scales; they include classification determinations,

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[13] After argument on reconsideration, the Director takes Official Notice of the Important Notice by former Acting Director Chuck Cake. In part, the Important Notice stated: "[W]hen a worker is required to work a shift outside of normal working hours, he/she must be paid the shift differential pay according to the shift he/she is working. . . . For example, if only one shift is utilized for the day and the work is being performed during the hours typically considered to be swing (second) shift … the worker employed during the hours typically considered to be a swing shift … must be paid the shift differential pay for the shift he/she is working."

[14] Cal. Code Regs., tit. 8, § 17245.

which necessarily include scopes of work and shift differential provisions. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120.) It would be impossible to accurately determine the prevailing wage without shift differential language, where appropriate in labor markets where the wage rates typically include such differentials. (See, Lab. Code, § 1773.9.)

The *Winzler* court recognized, prevailing wage determinations are regulations under the Administrative Procedures Act because it is part of the rate setting process. (Id., 121 Cal.App.3d at 748.) This means the Important Notice is a prevailing wage determination as well as a regulation; thus it is subject to Official Notice. Neither FEI nor its surety has articulated a reason why Official Notice should not be taken.[15]

The Important Notice is not an underground regulation. As the *Winzler* court recognized, regulations that set rates are exempt from the rulemaking requirements of the Administrative Procedures Act. (Gov. Code, § 11340.9(i).) Nothing in *Tidewater*, or cases decided since *Tidewater*, call into question the holding in *Winzler*. Therefore, the workers who were paid as Inside Wiremen during shifts that began at 3:00 p.m. were entitled to the shift differential, as set forth in footnote 3, *supra*.

The District, however, incorrectly applied the shift language to charge the final ½ hour of an eight hour shift at 1 ½ times the operative prevailing wage rate. Nothing in the language of the PWD provides for such an increase, and the Director will not infer any higher pay obligation. The shift language merely requires an increase for the first 7 ½ hours. The Amended Notice is amended to provide for a second shift differential only for the first 7 ½ hours of work on a second shift with the final ½ hour being paid at straight time only for those days the District in its post hearing submission claimed were subject to second shift. The District's recalculation under the remand order shall take these changes into account.

On the other hand, the Communication and System Installer shift language is explicit:

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[15] FEI's argument that the Important Notice should be considered after *Sheet Metal Workers v. Rea (Solano County Roofing, Inc.)* (2007)153 Cal.App.4th 1071, is misplaced. *Sheet Metal Workers* found that a classification determination was ineffective for public works projects advertised for bid prior to the determination. Here, the

"The employer shall be permitted to adjust the starting hours of the shift by up to two hours in order to meet the needs of the customer." Here the adjustment was less than two hours and therefore within the plain language of the PWD. For the reasons stated above, however, the District's calculation of second shift differential was incorrect in that it applied an increased premium for the last half hour of work where none is required. The District's recalculation under the remand order shall take these changes into account.

FEI argues that even if the second shift rate applies, it should receive credit for $7,272.45 in overpayments to workers that resulted from paying them for a full 8-hour shift on days that they actually stopped work at 9:30 or 10:00 p.m. due to closure of the campus. Garnica's testimony that on unspecified dates he was present before 11:00 p.m. and no work was being performed is so lacking in detail that no conclusion can be drawn. Further, FEI has provided sign-in sheets for certain days to show that work did not occur on a second shift. The sign-in sheets list start time and stop time. FEI's failure to provide similar sign-in sheets to show when workers went home early on a second shift creates an inference that work did not end early. (Evid. Code, §412.) Since FEI failed to provide any evidence to support its claim of overpayment, there is a complete failure of proof on this point.[16]

Additionally, FEI argues that the second shift rate is essentially a form of overtime compensation, citing 8 CCR 16200(3)(F), which provides that overtime will be paid as indicated in the wage determination, with certain exceptions. This exemption does not apply because second shift payments are not a premium for overtime but rather a payment for the dislocation of starting work later than normal.

FEI Failed To Pay Its Workers Fringe Benefits.

Two issues exist regarding whether fringe benefits are due: whether all fringe benefits were paid for the hours identified in the CPRs and what additional fringe benefits are owed for hours worked, but not included in the CPRs. Additional fringe benefits are owed in each

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Important Notice had been issued and posted on the DIR website well before the Project was advertised for bid.

[16] Even if a worker were overpaid, no offset would be appropriate beyond the specific work day. (*Barnhill v. Saunders & Co.* (1981) 125 Cal.App.3d 1.)

instance.

The check stubs and CPRs do not include an accounting of fringe benefits paid. Instead, they list the basic prevailing wage rate and withholdings only, in violation both of section 1776 [CPRs] and of section 226 [pay stubs]. Because of this omission the District originally asserted FEI paid no fringes to any of its workers. During the investigation, FEI provided evidence to the District, in the form of cancelled checks, that it had paid some, but not all, fringe benefits to the appropriate trust funds during construction.

No one has provided an accurate accounting of the amount of fringe benefits due to each worker, although the District has shown that fringe benefits remained unpaid at the time of the original Notice. The District's figures for unpaid fringe benefits are not broken out by worker. During the hearing process, the District continued to confuse the issue by changing its figures to reflect how much FEI has paid to date, rather than calculating the amount unpaid at the time of the Notice (which is the trigger date).[17] On the other hand, FEI's evidence is inaccurate; and its assertions unsupported by its own exhibits. Any fringe payment due a worker that has not been paid to a trust fund remains due and owing to the worker. The fringe benefits due have to be calculated worker-by-worker so that appropriate offsets are taken for each. (§§ 1772, 1773.1.) On remand, the District shall provide a more careful and precise accounting of the fringe benefits due.

FEI Failed To Pay Training Funds.

FEI's obligation to make training fund contributions in accordance with section 1777.5(m) is uncontested as was FEI's failure to do so. The Amended Notice is therefore affirmed as to this charge.

FEI Failed To Pay Gamb Prevailing Wages For All His Work.

Gamb testified convincingly that he worked as an Inside Wireman simultaneously on supervising the workers. Gamb also authenticated the records he prepared contemporaneously with his work that detail his work as an electrician and supervisor. Finally, the CPRs show

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[17] Fringe benefits paid after the original Notice would reduce the actual amount due but would not affect the calculation of penalties or liquidated damages.

Gamb worked and was paid as an electrician the majority of the time he was at El Oro.

FEI'S only witness to testify about Gamb's activities was Garnica, who did not have personal knowledge of when Gamb acted solely as a supervisor. Garnica's testimony does not meet FEI's burden to prove the Amended Notice is incorrect. FEI's reliance on *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal. App. 4th 345 as support for its claim that it does not have to pay prevailing wages to supervisors fails both factually and because the decision does not support FEI's position.

FEI Proved Bruce Spitzer Did Not Work On The Project.

Fedida's testimony was based on his personal knowledge of the Project and the tasks Spitzer was hired to perform. FEI, therefore, has carried its burden of proving this part of the Amended Notice is incorrect. The Amended Notice is modified to dismiss the District's determination as to Spitzer.

Edgar Aquino Was Properly Paid As An Apprentice.

The District had no basis for deciding that Aquino should have been reclassified from apprentice to Laborer for two days. The construction diaries report multiple tasks being performed from electrical to final clean up. There was no basis to assume that whatever clean up work Aquino performed was not ancillary to his training to be an electrician. Therefore, FEI correctly paid him as an electrician apprentice, and the Amended Notice is amended to dismiss the District's determination as to Aquino.

Garnica Is Not Owed Prevailing Wages.

Garnica's testimony that he was a project manager and never performed labor on the Project more than overcame the Amended Audit's conclusion that he worked on two days as an Inside Wireman on the Project. The Amended Notice is amended to dismiss the District's determination as to Garnica.

THE DIVISION'S PENALTY ASSESSMENT UNDER SECTION 1775 IS APPROPRIATE. THE TOTAL AMOUNT MUST BE RECALCULATED PURSUANT TO THE REMAND ORDER.

Section 1775(a) states in part as follows:

(a)(1) The contractor or subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates ... for the work or craft in which the worker is employed for any public work done under the contract by the contractor....

* * *

(2)(A) The amount of this penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

* * *

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

* * *

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Abuse of discretion is established if the District "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Pro., §1094.5(b)). The affected contractor has the burden to prove that the basis for any penalty assessment is incorrect. (§1742(b)) There are two distinct factors that control the amount of penalties: the amount assessed for each penalty and the number of violations.

The District assessed the penalty amount at the maximum of $50.00 per violation per worker. FEI has not proved that the District abused its discretion in setting the amount of each violation. The failure to pay fringe benefits timely and the failure to pay appropriate shift differential where the provision was clear are obvious violations that demonstrate a lack of good faith. The District further relied on two prior settlement agreements with FEI as well as testimony that a jury previously found FEI liable for failing to pay prevailing wages. The documentation for the prior settlements demonstrates that FEI knows of its obligation to pay prevailing wages as well as the obligation to classify it workers correctly. The prior settlements

do not demonstrate problems with payment of fringe benefits, although FEI never denied knowing of its obligation.

FEI presented no evidence that it did not know of its obligations under the prevailing wage law or, except as noted below, that its activities were in good faith. For example, FEI does not explain any basis for submitting CPRs with blended rates or without the mandatory information on fringe benefits paid. It consistently confused both the District and the hearing process by referring to basic wage rates only as if that were its sole obligation. While an amount less than $50.00 might have been equally appropriate in this case, the Director will not substitute his judgment where the District considered all the relevant factors and set an amount within reason.

FEI seeks to have all penalties dismissed under *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal. App. 3d 635 because the Department of Industrial Relations and the District provided misleading advice to FEI. In *Waters*, the Court of Appeal held that a public entity could not recover penalties when it did not comply with the Labor Code's requirement of posting prevailing wage rates and that provided incorrect information to the contractor who relied on it. *Waters*'s holding rests on settled principles of equitable estoppel:

> Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.
>
> *Id.*, 192 Cal. App. 3d at 641 (citation omitted).

FEI's evidence, however, does not prove the *Waters* factors for either statements by DLSR or the District. Feigel is so vague that it does not even prove that a conversation occurred with DLSR. The witness opines she "most likely" talked to someone at "DLSR" about safety meetings. The evidence lacks specificity as to time or date; it lacks specificity of what the DLSR employee was told were the facts and what basis the DLSR employee gave for their opinion. The testimony is devoid of evidence that the witness even asked the DLSR employee about pick up and delivery time.

Further, this testimony fails to explain why the workers were paid for as much as a full hour at non-prevailing wage rates for 15 minute safety meetings.

There is also no evidence that the District misled FEI on any issue. At most, the District may have not have uncovered one more questionable pay practice during its routine audits of FEI's CPRs. This is insufficient to meet the *Waters* test.

The Amended Notice already has been modified to remove at least 18 violations (Aquino (2), Garnica (2), and Spitzer (14)) and potentially more after the District recalculates its audit as part of the remand order. The recalculation of the number of penalties under section 1775 only is therefore remanded to the District for further calculation consistent with this decision.

FEI IS LIABLE FOR PENALTIES FOR ITS FAILURE TO PAY OVERTIME WAGES.

On one occasion, the Amended Audit reported that Marshall Dunmore worked on a Saturday as an Inside Wireman. This entitled him to payment at the overtime rate. As there was no testimony on this issue, the Amended Audit is conclusive on the facts. Section 1813 provides for a mandatory penalty of $25.00 per day for every day that a worker does not receive overtime pay when due. The Amended Audit is affirmed as to the $25.00 penalty.

FEI IS LIABLE FOR LIQUIDATED DAMAGES ON THE WAGES DUE AND UNPAID PURSUANT TO THE REMAND ORDER

Section 1742.1(a) provides in pertinent part as follows:

> After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a Notice of withholding under subdivision (a) of Section 1771.6, the affected contractor ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or Notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or Notice to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal.Code Reg., tit.8, section 17251(b)] states as follows:

> To demonstrate 'substantial grounds for believing the Assessment or Notice to be in error,' the Affected Contractor or Subcontractor must establish (1)

> that it had a reasonable subjective belief that the Assessment or Notice was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.

To the extent wages have been found to be owed in this decision, FEI fails to meet the criteria of Rule 51(b). FEI provided no satisfactory explanation why: 1) it did not list fringe benefits payments on its CPRs, 2) it did not comply with the plain shift differential language in the Communication and System Installer determination, 3) it failed to pay its workers accurately for the tasks they performed each day, and 4) it paid fringe benefits late or not at all. Similarly, FEI has no authority to support its decision to pay its workers less than prevailing wages on this public work. FEI cannot claim to have had a reasonable, subjective belief that the Notice was in error concerning fringe benefit payments since it acknowledges it failed to pay them when due. FEI's claim that it did not owe prevailing wages for safety meetings, and pick up and delivery lacks an objective basis in law and thus is not substantial grounds for believing the Notice to be in error. For these reasons, it is found that liquidated damages are appropriate for the wages due and unpaid in accordance with this decision.

THE NOTICE WAS TIMELY.

Section 1741 provides in part:

> . . . The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180 day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. . . .

The time between the recordation of the Notice of Completion and the original Notice is 176 days, within the time allowed under section 1741. FEI appears to argue that the operative trigger date should be the cessation of labor, as if the Project were a private work. (See, e.g., Civ. Code, § 3086 [defining completion of a project].) Reliance on the Civil Code standard confuses trigger dates. The Civil Code speaks in terms of "completion" whereas the Labor Code

trigger date for 1741 is **Notice of Completion** or **acceptance**. "Formal acceptance has been defined as that date at which someone with authority to accept does accept unconditionally and completely." (*Madonna v. State of California* (1957) 151 Cal.App.2d 836, 840.) FEI has not proved that someone authorized by the District to accept the Project as complete accepted the project prior to the date specified in Request for Forfeiture. While FEI showed its work was completed in 2005 and the on-site inspector approved the work as completed, this is not necessarily the equivalent of acceptance, and FEI failed to prove that the inspector has authority to bind the District on the question of accepting the Project.[18]

FINDINGS

1. The contract between the Los Angeles County Unified School District and the Contractor, FEI Enterprises, concerning the El Oro Safety and Technology Project, Project # 97.02938 is a public works contract subject to the payment of prevailing rate of wages to the workmen employed in the execution of this contract.

2. Affected Contractor FEI filed a timely Request for Review from a Notice of Withhold issued by the Los Angeles County Unified School District.

3. The District correctly reclassified FEI workers as part of its investigation, except for Edgar Aquino. The District correctly determined the number of hours subject to the payment of prevailing wages.

4. The Determination is dismissed as to Edgar Aquino, Bruce Spitzer, and Thomas Garnica.

5. Training funds are due in the amount of $1,881.84, payable to the California Apprenticeship Council.

6. FEI failed to prove the District abused its discretion in setting the penalty amount at $50.00. under section 1775. The District is to recalculate the number of violations in accordance with the above findings.

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[18] Similarly, the Decision is timely because it is being issued within 45 days of its resubmission necessitated in large part by FEI's failure to seek the admission of documents critical to its case. Any other timeliness issue is now moot. (See, *California Correctional Peace Officer Association v. State Personnel Board*

7. FEI is liable for overtime penalties under section 1813 in the amount of $25.00.

8. Liquidated damages under section 1742.1 are due in an amount equal to the unpaid prevailing wages eventually found due and owing.

9. This decision is final as to all issues not specifically subject to the Remand Order. Labor Code section 1742(c).

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed as set forth in the above Findings.

Remand Order: The matter is remanded to the District to recalculate the wages due as follows:

a. All recalculations shall be based on the operable PWDs, enumerated above.

b. The classifications and hours used in the Amended Notice shall be used in the new audit, except as other dismissed or amended above.

d. Second shift differential payments shall be calculated for workers paid as Inside Wiremen and for workers paid as Communication and System Installers who worked on the days specified in the District's post hearing brief. There shall be no increase above the basic hourly rate for the half hour starting 7 ½ hours after the beginning of a second shift.

e. Fringe benefits due shall be calculated on a worker-by-worker basis giving FEI credit for those payments made prior to the date of the original Notice, regardless of when the evidence came into its possession. The District shall separately calculate on a worker-by-worker basis all payments made within 60 days of the original Notice and for all periods thereafter.

f. The District shall present its new audit to FEI and Intervener within 30 days of the date of service of Notice of Findings. FEI shall have 30 days from service in which to request a hearing before the hearing officer providing with specificity why the District's calculations are erroneous. If such a hearing is requested, the scope shall be limited solely to the numerical accuracy of the District's revised audit; that is, the only issue shall be whether the District did its math correctly. All other issues are final. The burden to show error shall remain on FEI. If no

hearing is requested within 30 days, the revised audit shall become final and liquidated damages in the amount of unpaid prevailing wages shall issue.

g. In complying with the remand order, the District shall only rely on those documents admitted into evidence. If the District requires the use of other documents for its audit, it shall provide them to FEI and the Intervener at the time it presents the audit. FEI shall be provided an opportunity to supplement the record as well should it request a hearing.

The Hearing Officer shall issue a Notice of Findings to be served with this Decision on the parties.

Dated: 12/10/08

John C. Duncan
Director of Industrial Relations